No. 7302

United States Circuit Court of Appeals

For the Ninth Circuit

DANG NAM,

Appellant,

vs.

JAMES B. BRYAN, District Director of Immigration, Port of Honolulu, Territory of Hawaii,

Appellee.

PETITION FOR REHEARING.

INGRAM M. STAINBACK,
United States Attorney,
District of Hawaii.

WILLSON C. MOORE,
Assistant United States Attorney,
District of Hawaii.

ERNEST J. HOVER,
U. S. Department of Labor,
Immigration and Naturalization
Service, Honolulu, T. H.

Attorneys for Appellee.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

Index of Cases Cited

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To the United States Circuit Court of Appeals for the Ninth Circuit, and the Judges Thereof:

Comes now W. G. Strench, successor to James B. Bryan, District Director of Immigration and Naturalization at the Port of Honolulu, Territory of Hawaii, appellee in the above entitled cause, by and through INGRAM M. STAINBACK, United States Attorney for the District of Hawaii, as successor counsel to the former United States Attorney whose appearance has heretofore been entered herein, and presents this, his petition for a rehearing of the above-

entitled cause, in which judgment was rendered by this Court on December 21, 1934, reversing the judgment of the District Court of the United States for the District of Hawaii, and wherein extension of time has been granted in which to make this application; and for grounds thereof respectfully shows:

I.

That this Court is without jurisdiction to entertain the appeal herein, and to consider on the merits the original final order of the District Court of the United States for the District of Hawaii ordering deportation of the appellant, made and entered on December 3, 1932 (R. 2, 59; T. 54), because the petition for allowance of appeal was presented and the appeal perfected on December 21, 1932 (R. 3, 60; T. 56), not within the ten (10) days provided by Rule 126 of the District Court of the United States for the District of Hawaii.

This rule of the above Court, adopted on January 31, 1918, is now and ever has been continuously in effect, and wholly unamended; it is set forth at Page 841, Volume 4, Reports of the United States District Court for the District of Hawaii, and provides in respect of appeals in habeas corpus proceedings:

> "The transcript of the petition, writ of habeas corpus, return thereto, pleading, motions, evidence, and proceedings and orders therein shall be presented for allowance and the appeal perfected within 10 days after the final decision is rendered."

The force and effect of this rule of court was considered by this Court in 1933, in a case of the original appellee herein v. Fumio Arai, 64 F. (2d) 954, as follows:

> "Appellee's contention, in which we concur, is that since the petition for allowance of appeal was presented and the appeal perfected, not within the 10 days provided by Rule 126 of the Hawaiian court * * * this court cannot entertain the appeal."

Your petitioner notes, with apology to this Honorable Court, that this point was not directed to the attention of the Court in the brief heretofore filed by former counsel for the appellee, but avers that since "it is the duty of federal appellate courts, in every case, to examine its jurisdiction, whether such point has been raised or not" (*Bremner v. Thomas*, Eighth Circuit Court of Appeals, 1928, 25 F. (2d) 301), this Court may and will, at this time, although after decision on the merits, take notice of the want of jurisdiction herein, and correct this inadvertence.

Your petitioner submits that it is clear that in the first instance, despite appellee's omission, it was the duty of the Court to inquire as to its jurisdiction, even though the question related merely to procedural steps. Thus, as in *Bremner v. Thomas* above:

> "As the petition for appeal and assignment of errors were filed more than three months after the entry of the order from which the appeal is taken, and as this matter is jurisdictional, the

entitled cause, in which judgment was rendered by this Court on December 21, 1934, reversing the judgment of the District Court of the United States for the District of Hawaii, and wherein extension of time has been granted in which to make this application; and for grounds thereof respectfully shows:

I.

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> "As the petition for appeal and assignment of errors were filed more than three months after the entry of the order from which the appeal is taken, and as this matter is jurisdictional, the

> appeal must be dismissed for want of jurisdiction because not taken within the time required by law."

A similar conclusion of the Eighth Circuit was entered in the case of *Cleveland Cliffs Iron Co. v. Village of Kinney* (1920), 266 Fed. 288. The Seventh Circuit, in 1934, in the case of *Perlman v. Burdick,* 68 F. (2d) 729, observed:

> "Although the appellee did not raise the question as to the improper method of taking the appeal, it is the duty of this court to inquire sua sponte as to its jurisdiction."

In an immigration proceeding, the Seventh Circuit had earlier held:

> "A question of jurisdiction, though not raised by either party, cannot be ignored."
>
> *Smith, District Director of Immigration v. U. S. ex rel. Gorlo,* 52 F. (2d) 848.

Nor can jurisdiction to determine an appeal be conferred by the parties' consent: *Satterlee v. Harris,* Tenth Circuit, 1932, 60 F. (2d) 490.

Consistent with the above position announced by the Seventh, Eighth and Tenth Circuits, your petitioner avers that the clear authority on this point is further observed in the decisions noted by the Second Circuit (*In re Torgovnich* (1931), 49 F. (2d) 211; *Cory Bros. Co. v. U. S.* (1931), 47 F. (2d) 607); the Third Circuit (*Garvin v. Kogler* (1921), 272 Fed. 442); the Fourth Circuit (*Osborn v. U. S.* (1931), 50 F. (2d) 712); the Sixth Circuit (*Republic Iron and*

Steel Co. v. Youngstown Sheet and Tube Co. (1921), 272 Fed. 386); The Circuit Court of Appeals for Porto Rico (*Diez v. Green* (1920), 266 Fed. 890); and the Court of Appeals, District of Columbia (*Trans-Atlantic Trust Co. v. Pagensteeher* (1923), 287 Fed. 1019).

It follows, if this Court should have found in the first instance that it was without jurisdiction, despite the inadvertence of appellee herein, that it now will, upon rehearing, before entry of the mandate upon the judgment heretofore made, do what the law requires and recall the heretofore unauthorized consideration of the merits of the instant controversy, holding the appeal for naught and without the jurisdiction of this Court.

II.

Failing this, and in the alternative, your petitioner respectfully shows the following points upon the merits of the question of statutory construction considered herein, not heretofore adverted to, feeling also that if the Court is disposed thereby to question the validity of the conclusion heretofore entered, the more reason will appear for the granting of the first noted above grounds for dismissal of this appeal:

1. It was the *intention* and *belief* of Congress in enacting the act of February 18, 1931 (46 Stat. 1171, 8 U. S. C. A. 156a) to provide for the deportation of each and every alien peddler or dealer (excluding non-dealer addicts), convicted under the Harrison Narcotic Act, without limitation or control by judicial recommendation against such deportation. It is sub-

mitted that the bill was passed to rid the country of aliens engaged in the drug traffic. It was not contemplated that any clemency would or should be extended to this class of law violators. It is submitted that this clearly appears from the Senate Report, No. 1443, of February 2, 1931, upon H. R. 3394, wherein the Senate Committee quotes with approval the following language from House Report No. 1373 of May 2, 1930:

> "The flow of dangerous habit-forming illicit narcotics from the factories of Europe continue to seep into the life blood of the American people. bringing misery, disease, and crime in its wake. The main purpose of the bill is to permit the Government to deport the alien smugglers and those aliens higher up in the big international ring who are worse than murderers. *Every available weapon of enforcement and of law must be put to work to combat these human fiends* who would destroy for the sake of greed the happiness of the American people. *Deportation is a proper and effective weapon* against aliens who violate our laws and release the United States from the cost of maintaining them in our already crowded jails." (Italics supplied.)

It is but mockery of this legislative language to graft upon this bill drawn with these purposes and ends in view the qualification that any sentencing magistrate may recommend against the deportation of aliens so convicted.

2. The bill, as H. R. 3394, reported out of the House committee on May 2, 1930, was originally en-

titled, "An act to amend Section 19 of the act of February 5, 1917". The Senate amended the title to read, "A Bill to provide for the deportation of aliens convicted and sentenced for violation of any law regulating traffic in narcotics". (Senate Journal, February 10, 1931, Cong. Rec. p. 4486). This amendment is in harmony with the true and larger purposes of the Act which became the law of February 18, 1931.

3. When the House passed H. R. 3394, on June 9, 1930, Cong. Rec. p. 12453, the law provided for the deportation of such aliens who "violate or conspire to violate" the narcotic acts. It did not require a *conviction* or *sentence*. Thus, as originally drawn, the act did not contemplate any judicial recommendation or judicial action whatsoever in affixing the liability to deportation. Also, as originally drawn, the act did not exempt addicts. Thus Congressman Stafford, at page 10324, Congressional Record, on May 2, 1930, addressed to Congressman Fish, who reported the bill from committee, this question:

> "Mr. Stafford: Do I understand it is the purpose of the gentleman from New York to deport every narcotic addict and every user of opium in case he happens to be an alien?
>
> "Mr. Fish: The gentleman is correct."

Again, on July 2, 1930, at page 12367, Cong. Rec., the all-inclusive nature of the intended legislation was again attacked by Congressman Stafford as follows:

> "I stated in private conversation with the gentleman from New York that the bill should be framed so as to be limited to dealers and

> peddlers. As pointed out by the gentleman from New York, I also stated that there might be an individual who happened to use opium once but who was not an addict, and yet he would be deportable. It is inconceivable to me that any committee would report a bill of this drastic character which would deport addicts just because they are aliens. I think this bill should go over until tomorrow."

The point is this: At no time in the discussion of the bill when its unlimited application was being attacked, was it intimated by the committee framers that the reference in the bill to Section 19 of the act of February 5, 1917 operated to require or permit a judicial election for or against deportation. If it had been intended that the bill did so provide, here, of all times it would have been mentioned as an answer to the attacks made upon the wide scope of the measure.

Thus the bill was reported out of the House, restricted to non-addicts unless the same were dealers or peddlers, and providing for deportation "in the manner provided by Sections 19 and 20 of the Act of February 5, 1917" of aliens who "violate or conspire to violate" the various narcotic acts. The Senate on February 14, 1931, Cong. Rec. 4935 amended this last clause to apply to any alien "convicted and sentenced for violation of or conspiracy to violate", etc. Of this amendment Congressman Vincent of Michigan said in the House on February 14, 1931, when the Senate amendment was agreed to (P. 4936, Cong. Rec.):

> "The only important amendment in the bill was one which requires conviction and sentence while

> the House bill only required that the man be found guilty of having done the various things stated in the bill."

Therefore it affirmatively appears with reference to this legislation that it was ultimately passed by the House on the theory that it was changed from the original measure only by requiring a conviction and sentence, rather than a "violation".

Manifestly, this Court's argument in the closing paragraph of its decision based on the theory that "deportation is not because of the commission of a crime" could not apply to the original House measure. For that is precisely the basis originally intended for liability to deportation under the act of February 18, 1931. And it follows, if this is true, that the House did not understand that the effect of the Senate amendment, by reason of requiring a conviction, also made possible a judicial recommendation against deportation.

4. In short, the whole course of this legislation shows no disposition nor intention to adopt any of the substantive considerations of Section 19 of the act of February 5, 1917, regarding the deportation of that execrable, detestable, and verminous criminal, the dope dealer or peddler. To him no clemency was to be extended. The substantive provisions of Section 19 regarding convicted aliens, are five:

> First, the conviction must occur within five years of the alien's entry into the United States.

Second, the conviction must be for a crime involving moral turpitude.

Third, the sentence must be for the term of one year or more.

Fourth, the deportation may occur at any time after entry in the event of the conviction of two or more such offenses.

Fifth, the sentencing court may at the time of sentence recommend against deportation.

It is true the procedural provisions in Section 19 in respect of such deportation are limited to one only; but it is the initiatory and all-important step. It provides (at the end of the first sentence of Section 19 after eleven (11) semi-colons) for the arrest and custody of the deportee upon warrant of the Secretary of Labor. But it is emphasized that such procedural provision, respecting the "manner" of deportation, does most importantly appear in Section 19.

It is submitted that if this Court is going to subject the act of February 18, 1931 to *all* the *substantive* provisions, and not just the *procedural* provision of Section 19, it is apparent that in any event the violation involved in this case on the part of Dang Nam was not within the original requirements wherein a judicial recommendation would lie.

First, it was not a sentence for a year or more, but only for six months, and therefore, either no deportation will lie whatsoever (as this Court held in *Weedin v. Moy Fat,* 1925, 8 F. (2d) 489, construing the cognate act of May 26, 1922), or else if the latter

act of 1931 be held to overcome the earlier requirement (as this Court held regarding the five-year provision in *Chung Que Fong v. Nagle,* 1926, 15 F. (2d) 789, also construing the Act of 1922), then it is not a case for which judicial recommendation is provided. This last conclusion was the view of the Fifth Circuit in *Rodriguez v. Campbell,* 1925, 8 F. (2d) 983.

Again, this was not a conviction within five years of the defendant's entry. Therefore, does the act of February 18, 1931 warrant his deportation in any event?

The purpose of this argument is to point out that if this Court adopts as essential to the act of February 18, 1931, *all* the *five* substantive provisions of Section 19, the act thus is stretched out of all semblance to agreement with Congressional intent. It is submitted that Congress did *not intend* to require a sentence of a year or more with reference to the alien violators of narcotic acts. It did *not* intend to limit deportation to crimes involving moral turpitude. It did *not* intend to limit the act to aliens who had been here less than five years, nor require two convictions of those aliens who had lived here beyond five years. But if the substantive provision regarding judicial recommendations is to be enforced by this Court, how can it escape enforcing the remaining four substantive provisions? If this view is adopted, the act is entirely emasculated, and indeed is nullified as the District Court for the Southern District of New York observed in *The Conte Grand—U. S. ex rel Magri v. Wixon,* 1931, 53 F. (2d) 475. Admittedly, the *sine qua non* of statutory construc-

tion is to enforce legislative intent. When this can be done without violence to language, it is imperative to do so.

5. Your petitioner submits that the narrower and restrictive application of the phrase "in the manner provided by" does not do violence to the express language of the act, nor to the legislative purpose. The Committee on Immigration and Naturalization in the House of Representatives may reasonably be regarded to have had knowledge that the expression "in accordance with the provisions of Sections 19 and 20," used in the act of 1922, had in the reported decisions been held to "adopt the whole of the provisions relative to deportation contained in those sections" (Circuit Judge Gilbert in *Hampton v. Wong Ging,* 1924, 299 Fed. 289).

"Accordance" means, per Webster's Dictionary, "agreement; harmony; concord; conformity." It is submitted that such language *is broad enough* to include the substantive, as well as the procedural provisions of Section 19.

The word "manner" is usually defined, says the American and English Encyclopedia of Law, 2nd ed., p. 918, as "meaning way of performing or exercising * * * The derivation of the word is from the Latin *manus,* the hand. Manner is literally the handling of a thing, and embraces both method and mode". Webster says: "manner: a way of acting, a mode of procedure; the mode or method in which something is done". It is submitted that the language of the act of 1931 is *narrow enough* to exclude the substantive

and include only the procedural provisions of section 19. When it is considered that the framers of this legislation departed from the earlier phrase of the act of 1922, and used a more restrictive phrasing in the act of 1931, the conclusion urged by your petitioner seems inescapable.

Coupled with this, when the broad scope of Congress' intent in this legislation is kept in mind, it becomes almost imperative that this Court, in order to enforce the legislative will, must give the reference to section 19 only the effect of specifying the procedural provision and not those of substantive character.

6. It should not be lost sight of that the Act of May 26, 1922, of itself made provision that the deportee should be taken into custody upon warrant issued by the Secretary of Labor. *The Act of February 18, 1931, is silent on this point.* Thus, while Section 19 of the Act of 1917 does most emphatically contain a procedural provision in this respect regarding deportation (Judge Kerrigan erred in *U. S. v. George Wing,* 1925, 6 F. (2d) 896 in stating that Section 19 does *not* contain any provision as to the manner and procedure on deportation; and this error was repeated by this Court in *Weedin v. Moy Fat.* above; and perpetrated by appellant's counsel again in his Brief, pgs. 6, 7) it is still true that in the Act of 1922 no procedural provision of Section 19 remained to be incorporated by reference. But that is not true of the Act of February 18, 1931. An important procedural provision does remain to be in-

corporated into the Act of 1931 from Section 19. It is the initiatory and all-important step; it is the manner of placing the deportee in the custody of the Secretary of Labor. This radical difference between the two acts makes impossible a decision here based on the logic which appealed to District Judge Kerrigan and Circuit Judge Gilbert in the cases noted. Thus, in the instant legislation a reason does exist for referring to Section 19, in order to invoke the procedural provision noted, without leaving room for the assumption, formerly argued regarding the Act of 1922, that Congress' *only purpose* in referring to Section 19 was to invoke the provision regarding judicial recommendation.

III.

Lastly, your petitioner is not oblivious to the considerations of individual justice involved in this case. While this appellant is rendered deportable upon a plea of guilty, there is no indication that he had an alternative. There is no indication that the prime motive in so pleading was an indicated recommendation against deportation, or that, had he stood trial, the result would have been otherwise. (Statement of Narcotic Agent, R. 50, and Examination of Appellant, R. 44-48). The case against this appellant appears to have afforded no alternative. Therefore, it is not the case, as erroneously claimed by appellant in the last paragraph of his Brief, that this statute must be classed as penal and should receive a construction favorable to him. Rather, the plain mandate of the

Supreme Court is that while deportation may be burdensome and severe for the alien, it is not a punishment, and the rules of criminal law are not applicable; *Mahler v. Ebey,* 1924, 264 U. S. 32, 68 L. Ed. 549, 44 S. Ct. 283.

WHEREFORE, upon the grounds stated it is respectfully urged that this petition for a rehearing be granted; and that upon the ground first stated this appeal be dismissed; and failing this, that upon the remaining grounds urged the judgment of this Court be upon further consideration reversed.

Dated, this 2nd day of February, A. D. 1935.

INGRAM M. STAINBACK,
United States Attorney,
District of Hawaii.

WILLSON C. MOORE,
Assistant United States Attorney,
District of Hawaii.

ERNEST J. HOVER,
U. S. Department of Labor,
Immigration and Naturalization
Service, Honolulu, T. H.
Attorneys for Appellee.

Certificate.

I, INGRAM M. STAINBACK, United States Attorney for the District of Hawaii, counsel for appellee herein, certify that the foregoing petition for rehearing is not presented for the purpose of delay or vexation; but is in my opinion well-founded in the law and the facts, and proper to be filed herein.

INGRAM M. STAINBACK,
United States Attorney,
District of Hawaii.

Service.

Receipt of a copy of the within Petition for Rehearing is hereby acknowledged this 2 day of February, 1935.

E. J. BOTTS,
Attorney for Appellant.